No. 83-747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

PAUL D. JOHNSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF MINORITY CONTRACTORS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

The National Association of Minority Contractors is a national organization representing minority-owned enterprises principally engaged in the construction industry. Most minority contractors are small, new companies that have been able to compete with the more established and larger companies only through federal assistance and innovative methods of removing financial impediments. One of the most serious financial barriers minority contractors have faced has been the cost of insurance. Minority contractors have been unable to obtain individual insurance coverage at rates competitive

with the coverage available to the more established, larger contractors. The federal government has recommended the use of wrap-up insurance programs as an effective method of overcoming this financial impediment.[1] The decision below, however, denies the Petitioner the opportunity to employ its wrap-up insurance program as a means of providing comprehensive compensation coverage for minority contractors under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, *et seq.* Because most minority contractors cannot obtain individual insurance coverage at competitive rates, the effect of the decision below will be to preclude them from participating in construction projects subject to the LHWCA by resurrecting the financial barriers the Petitioner's program had put an end to.

If the decision below is not reversed, the judicial branch of government will exacerbate the serious problems already inflicted upon minority contractors by the executive branch's continued reduction of federal assistance for construction projects, particularly mass transit systems.[2] The National Association of Minority Contractors, therefore, respectfully urges the reversal of the decision below, because it destroys a federally-approved insurance program that has previously been essential to

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[1] *See* pages 4-5, *infra*. Wrap-up insurance programs provide that the owner or overall general contractor purchase insurance coverage for all contractors, subcontractors and, as frequently is the case with minority contractors, sub-contractors. This removes the cost of insurance as a factor in submitting a bid, and thus eliminates any difference resulting from the insurance industry's evaluation of a particular contractor's specific risk of loss.

[2] The executive branch has also reduced the goals set for minority participation in federally financed transportation projects, thereby causing increased concern by the Petitioner and the District of Columbia that the level of minority participation in the WMATA project will decrease. *See* Metro Is Urged to Set Minority Goals Higher, Wash. Post, Nov. 24, 1983 at B2.

maximize the participation of minority concerns in the construction industry.[3]

ARGUMENT

THE DECISION BELOW WILL PRECLUDE MOST MINORITY CONTRACTORS FROM PARTICIPATING IN PROJECTS SUBJECT TO THE LHWCA, AND IT WILL INEVITABLY SUBJECT THE EMPLOYEES OF THE REMAINING MINORITY CONTRACTORS TO PERIODS WITHOUT COMPENSATION COVERAGE.

Despite the oft repeated admonitions of this Court,[4] the United States Court of Appeals for the District of Columbia Circuit has continued to redraft the LHWCA under the purported guise of "liberal construction" for the sole purpose of supposedly benefitting employees. Section 904(a) of the Act literally directs a general contractor to secure compensation benefits unless a subcontractor has secured such benefits. The Petitioner secured such benefits by the implementation of a wrap-up insurance program. The Court of Appeals, however, has ignored the plain language of Section 904(a) of the Act in order to allow the respondents to obtain double recoveries against the sole provider of compensation coverage. By so doing, the Court of Appeals has denied the Petitioner any *quid pro quo* for its bearing the cost and burden of no-fault compensation liability.

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[3] Respondents have consented to the filing of this amicus curiae brief, and this consent has been filed with the Clerk of the Court.

[4] *Hilyer* v. *Morrison-Knudsen Construction Company*, 670 F.2d 208 (D.C. Cir. 1981), *rev'd*, 103 S. Ct. 2045 (1983); *Riley* v. *U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980), *rev'd*, 455 U.S. 608 (1982); *Potomac Electric Power Co.* v. *Director, OWCP*, 606 F.2d 1324 (D.C. Cir. 1979), *rev'd*, 449 U.S. 268 (1980); *compare Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596 (1981), *with Potomac Electric Power Co.* v. *Wynn*, 343 F.2d 295 (D.C. Cir. 1965).

The effect of the decision below transcends the increased liability of the Petitioner and its subcontractors (who may also be subject to tort liability),[5] for it destroys the concept of wrap-up insurance, and will preclude many minority contractors from effectively competing for construction contracts. That decision will therefore exacerbate the already-serious racial imbalance in the construction industry. *See, e.g., United Steel Workers of America* v. *Weber*, 443 U.S. 193, 198 n.1 (1979) (collecting such findings). Further, the employees of minority contractors that can still obtain contracts will inevitably be exposed to periods without compensation coverage, because their employers will be compelled to purchase insurance from smaller, less secure carriers and/or the employers will invariably fail to stay current with the periodic payment of premiums.

This elimination of minority contractors from projects subject to the LHWCA is directly contrary to the efforts of the federal government to increase minority participation in the construction industry. For example, the Urban Mass Transportation Administration, which administers the federal funds provided to Petitioner, has expressly recommended wrap-up programs as a means of reducing the financial barriers that typically bar participation of minority concerns. In fact, the Urban Mass Transportation Administration directs applicants for federal funds to consider "providing wrap-up insurance for contractors and subcontractors" as a "means to overcome barriers to [minority program participation]." Urban Mass Transportation Administration, Department of Transportation, Circular C1165.1 (December 30, 1977). *Accord*, 49 C.F.R. § 23.45, Appendix A (1982).

Furthermore, a detailed study of wrap-up programs performed for the United States General Services Administration recommended the use of wrap-up programs

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[5] *See* footnote 16 of the decision. Pet. App. 56a n.16.

for all projects exceeding $20 million in total costs, and expressly recognized that such programs maximize the participation of minority concerns. General Services Administration's Wrap Up Study, p. 14 (August 22, 1975). A similar study performed for the United States Department of Transportation also recommended the implementation of wrap-up insurance programs for all major construction projects, again noting that such coverage is the only practical way that minority concerns can effectively compete for subcontracts on such projects. Insurance for Urban Transportation Construction, Report No. UMTA-MA-06-0025-77-13, at p. 1-21 (June 1977).

The principal advantage to minority contractors of wrap-up insurance is that it eliminates the cost of insurance when bidding on a project. The fledgling status of many minority contractors makes them an unknown risk to insurance companies. Additionally, minority contractors are often undercapitalized, having little equity with which to guarantee the continuous and timely payment of premiums. It is a natural commercial response on the part of the insurance industry to charge an increased premium to such concerns. Unfortunately, these new concerns lack the profit margins of more established firms, and the additional cost of paying insurance premiums will frequently make the difference between a successful or unsuccessful competitive bid.

For those minority contractors that do make successful bids, it is inevitable that their employees will be subjected to periods without compensation coverage, which is a result obviously contrary to the principal purpose of the LHWCA. Many minority contractors do not have the commercial experience and knowledge of the insurance industry to calculate accurately the cost of insurance when submitting a bid that may be two or three years in anticipation of actual work. The premiums for compensation coverage, already high, can sharply increase over the

lifetime of a contract because of legislative action and actual loss experience. In areas subject to the LHWCA, rates are based on an employee's salary and the nature of his occupation, and comprise approximately two-thirds of the total insurance costs for construction projects. Rates up to $50 for every $100 in salary can be assessed for tunnel workers such as the respondents here. Accordingly, premiums for compensation insurance constitute a substantial portion of the bid price of a construction contract. If a minority contractor miscalculates the cost of premiums (or any other such substantial cost), the contractor will be faced with the dilemma of making a payroll or paying insurance premiums. The pressures to take the first option are obvious. Any missed premiums result in the termination of insurance, thereby exposing employees to periods without coverage for compensation.

Another factor causing lapses in insurance coverage is the utilization of financially uncertain insurance companies. It is an unfortunate fact of commercial life that minority contractors are not attractive as customers for established insurance carriers. Many minority contractors are forced to use smaller, fiscally weak insurance companies because they are the only carriers willing to provide them coverage. Such carriers can and do fail for various reasons, again exposing employees to periods without coverage.

CONCLUSION

The decision below ignores the plain language of the LHWCA and destroys a federally-approved method of increasing minority participation in the construction industry. The decision will cause contractors and owners subject to the LHWCA to terminate any present wrap-up programs and to avoid using them in the future. Most minority contractors will be priced out of the industry because they cannot obtain individual coverage at competitive rates. The remaining minority contractors will

unavoidably subject their employees to periods without coverage for compensation because they will be forced to purchase coverage from less reliable carriers than those available to other contractors and/or because they will be unable to pay their periodic premiums. The decision below, therefore, defeats the federal interest in ensuring the maximum participation of minorities in business enterprises and the federal interest of ensuring that employees are covered by compensation insurance at all times. As this Court has stated before, courts must construe the LHWCA as drafted and "adhere closely to what Congress has written. . . ." *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. at 617. Accordingly, the National Association of Minority Contractors respectfully urges the Court to grant the petition for a writ of certiorari and to reverse the decision below

Respectfully submitted,

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